1980

State of Utah v. Mary Pierren : Reply Brief of Appellant

Utah Supreme Court

STEPHEN G. SCHWENDIMAN; Attorney for Respondent;MICHAEL E. BULSON; Attorney for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff
Respondent,

-vs-

MARY PIERREN,

Defendant
Appellant.

Case No. 16802

REPLY BRIEF OF APPELLANT

Appeal from the Memorandum Decision by Judge Calvin Gould of the District Court for Weber County, State of Utah.

MICHAEL E. BULSON
UTAH LEGAL SERVICES, INC.
Attorney for Appellant
385 - 24th Street
Suite 522
Ogden, Utah 84401
Phone: (801) 394-9431

STEPHEN G. SCHWENDIMAN
Assistant Attorney General
Attorney for Respondent
150 West North Temple
Suite 234
Salt Lake City, Utah 84103
Phone: (801) 533-7443

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INTRODUCTION

This action was filed with the Utah Supreme Court seeking judicial review and reversal of the decision of Judge Calvin Gould of the District Court of Weber County, State of Utah, dated October 3, 1979. Appellant's brief was filed with the Court on April 4, 1980 and the brief of the respondent and cross-appellant was filed on June 6, 1980.

STATEMENT OF FACTS

Appellant makes no exception to the statement of facts set forth in respondent's brief. However, it should be noted that appellant mistakenly stated on page 24 of her brief that she was legally divorced from her husband at

the time of her original application for AFDC assistance. (Appendix A) At the time of this application, appellant was separated from Pierre Pierren but was not legally divorced until July 26, 1976. Appellant was legally divorced from Pierre Pierren at the time she signed the reapplication forms referred to in the brief. (Appendices B and C)

ARGUMENT

POINT I.

SUBSEQUENT CASES MODIFYING THE KING V. SMITH DECISION CITED IN RESPONDENT'S BRIEF ESTABLISH THAT THE STATE OF UTAH WAS REQUIRED TO PROVE THAT APPELLANT'S EX-HUSBAND WAS ACTUALLY CONTRIBUTING TO HER HOUSEHOLD.

Respondent in its brief cites the United States Supreme Court decision of King v. Smith, 392 U.S. 309 (1968) as supporting the proposition that the mere presence of appellant's ex-husband, Pierre Pierren, in her home rendered her household ineligible for AFDC assistance. Following its decision in King v. Smith, the United States Supreme Court had further opportunity to consider the relevant AFDC regulations in Lewis v. Martin, 397 U.S. 552 (1970). In this case, the Court considered whether a regulation adopted by the Department of Health, Education and Welfare (HEW) providi in part, that where a man is ceremonially married to an AFDC mother but is not the real or adoptive father, his income may not be treated as available to the children unless he is legally obligated to support them.

The regulation considered and approved by the Court presently provides:

> A State plan under title IV-A of the Social Security Act shall provide that:
>
> (1) The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent...will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility of income by the State, nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions for non-legally responsible individuals living in the household.
>
> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions. 45 C.F.R. §233.90 (a)(1).

In approving the HEW regulations, the Court held:

> In the absence of proof of actual contribution, California may not consider the child's resources

> to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS (man assuming the role of spouse)- whatever the nature of his obligation to support. Lewis v. Martin, supra., at 559-60.

Another case in point is VanLare v. Hurley, 421 U.S. 338 (1975). In this case, petitioners were AFDC mother who brought an action challenging the reduction of their shelter allowance by New York State Officials on the basis that petitioners had allowed a person not a recipient of AFDC and who had no legal obligation to support the petitione family to reside in the household. The New York regulations in question reduced pro-rata the shelter allowance of an AFDC recipient to the extent that nonpaying lodgers were living in the household. After reviewing the King v. Smith and Lewis v. Martin cases, the Supreme Court held the New York regulations to be invalid, stating:

> Thus under the New York regulations the nonpaying lodger's mere presence results in a decrease in benefits. Yet the lodger, like the Alabama "substitute father" or the California "MARS," may be contributing nothing to the needy child. King v. Smith, supra, and Lewis v. Martin, supra, construe the federal law and regulations as barring the States from assuming that nonlegally responsible persons will apply their resources to aid the welfare child. Those cases therefore compel a reversal of the judgment of the Court of Appeals. VanLare v. Hurley, supra., at 346-47.

In view of the holdings in the two previously

cited cases, it is especially important to note that appellant's ex-husband, Pierre Pierren, was not the natural father of two of the children listed in appellant's application, dated April 2, 1976. The two children, Timothy H. Rodriquez and Larry D. Rodriquez, were from appellant's previous marriage with Larry D. Rodriquez, Sr. (Appendix E) Appellant ex-husband, Pierre Pierren, had not adopted the two Rodriquez children nor did state law at the time require him to provide for their support as a stepparent. Even assuming arguendo that Pierre Pierren was in appellant's home during the time period in question, under the United States Supreme Court decision noted, it cannot be assumed that Pierre Pierren was actually making contributions to the support of the children unless respondent can show that "the bread (was) actually set on the table". Lewis v. Martin, supra., at 559. Based on respondent's answer to appellant's Interrogatory No. 26 stating that it was not alleging that appellant's former husband was providing support or money payments to her children (Record, at 10) and on the fact that no evidence was presented by respondent at trial of "actual contributions" it should, at least, be concluded that respondent cannot be permitted to recover the portion of AFDC asistance paid to appellant for the support of the two Rodriquez children. This portion is one-half of the amount claimed or $2,040.00.

In addition, Lewis v. Martin also provides some support for the conclusion that respondent cannot presume that appellant's ex-husband, Pierre Pierren, was making actual contributions. The Court stated in part:

> Our decision in King v. Smith held only that a legal obligation to support was a necessary condition for qualification as a "parent"; it did not also suggest that it would always be a sufficient condition. We find nothing in this regulation to suggest inconsistency with the Act's basic purpose of providing aid to "needy" children, except where there is a "breadwinner" in the house who can be expected to provide such aid himself.

Even assuming Pierre Pierren was in appellant's home, it is evident from the record that he was not a "breadwinner" nor could he reasonably be expected to provide aid to the family. To allow respondent to recover the amount sought when Pierre Pierren was not actually putting bread on the table would defeat the purpose of the AFDC statute which is to aid "needy" children.

POINT II.

APPELLANT'S ARGUMENT CONTESTING THE AFDC REGULATION ON THE BASIS OF VAGUENESS SHOULD BE CONSIDERED BY THIS COURT SINCE IT RAISES A CONSTITUTIONAL ISSUE WHICH MAY PROPERLY BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

Respondent, in Point III of its brief, urges the Court not to consider appellant's arguments concerning the vagueness of the AFDC regulations and forms, because the issue was not raised at the trial level. Appellant recognizes the Court's reluctance to consider issues not raised at the trial level, but notes that case law in Utah, as well as in its sister state of Montana, provides support for the Court to do so. The Montana Court in the case of In Re Clark

Estate, 74 P.2d 401 (Mont. 1937) held that a constitutional question decisive of an appeal by the state on an inheritance tax matter could be considered even though the constitutional issue was first raised by the Court itself on appeal. The Court reached this decision despite the fact that, in its words, "the constitutional question was neither suggested, briefed or argued in the case prior to its submission for decision". In Re Clark's Estate, supra., at 405.

This Court has also considered whether a constitutional issue may be raised for the first time on appeal. In State v. Sheldon, 545 P.2d 513 (Ut. 1976), the Court declined to consider a constitutional issue on appeal since the transcript of the record did not reveal that the issue had been raised at the trial level. In a long dissent, Justice Maughan, relying in part on In Re Clark's Estate, argued that the Court should consider constitutional issues raised for the first time on appeal. Justice Maughan noted that the ordinance in question appeared on its face to raise a question of voidness for vagueness, a point especially relevant in view of the constitutional question appellant seeks to raise.

Based on the previously cited cases, appellant urges the Court to consider its arguments concerning the vagueness of the regulation and implementing forms.

POINT III.

THE LOWER COURT'S JUDGMENT AWARDING RESPONDENT $3,066.00 IS CONSISTENT WITH THE LOWER COURT'S FINDING THAT

THE APPELLANT WAS INELIGIBLE FOR AFDC ASSISTANCE.

In Point VI of its brief, respondent raises a cross-appeal contending that Judge Gould's holding which found the defendant ineligible for AFDC assistance from August 1976 to May 1977 is inconsistent with the judgment of $3,066.00. Respondent points out in its brief that at the time, the State of Utah was deducting amounts from appellant's AFDC assistance and purchasing food stamps for her. In view of the fact that the $1,014.00 deducted by the State from appellant's grant was used to purchase food stamps at a time when appellant was eligible for food stamps, the lower court's ruling on this particular point should be left in effect. Regardless of whether appellant's ex-husband was in her home, appellant was eligible for food stamps and her receipt from the State of assistance of this kind is unaffected.

POINT IV.

IN THE ABSENCE OF A DEMONSTRATION OF LACK OF NEED, FINANCIAL ASSISTANCE TO DEPENDENT CHILDREN CANNOT BE REDUCED ON THE BASIS OF A PARENT'S CONDUCT.

Respondent, in Point V of its brief, urges, in reliance on King v. Smith, supra. and Graham v. Shaffer, 17 Ariz. App. 497, 498 P.2d 571 (1972), this Court to not consider that appellant, during the time period in question, was eligible for other financial assistance which would be unaffected by the presence or non-presence of her ex-husband, Pierre Pierren, in her home. Yet, the record

in the case indicates that appellant was, in fact, eligble for such assistance, including:

a. Stepchildren's Assistance;

b. AFDC-Unemployed Parent Assistance (AFDC-UP);

c. General Assistance; and

d. Food Stamps.

Again, appellant's needy children should not be victimized by a recoupment of assistance from a mother who was eligible for assistance.

Further, respondent's arguments ignore the cases cited in appellant's brief which establish that a recoupment cannot be made from an AFDC mother absent a showing of lack of need. This rule has recently been restated by the New York Supreme Court in Chan v. Blum, CCH Poverty Law Reporter, New Developments ¶31,108. For convenience, a summary of the decision is attached hereto as Appendix A.

CONCLUSION

The purpose of the AFDC program is to aid needy children. Appellant is an AFDC mother struggling to support four needy children without assistance from the fathers of the children. The State of Utah has apparently taken no action to collect child support payments which appellant has assigned to it. If allowed to stand, the District Court's decision will further add to the burden of appellant and her needy children.

In this appeal, the Court has ample basis

for correcting a condition which unfairly affects appellant and other AFDC mothers in Utah. Appellant urges the Court to rule in her favor so that the purpose of the AFDC program can be achieved.

DATED this 4th day of September, 1980.

Respectfully Submitted:

UTAH LEGAL SERVICES, INC.

Michael E. Bulson

MICHAEL E. BULSON
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to STEPHEN G. SCHWENDIMAN, Assistant Attorney General, Attorney for Respondent, 150 West North Temple, Suite 234, Salt Lake City, Utah, 84103, this 4th day of September, 1980.

Michael E. Bulson

MICHAEL E. BULSON
Attorney for Appellant

[¶ 31,108] *In the Applicatiuon of Pao Ching Chan v. Barbara Blum, etc., et al.* New York Supreme Court Appellate Division, First Department. Memorandum Decision dated May 1, 1980. Before Sandler, P.J., and Ross, Silverman, Bloom and Carro, JJ.

AFDC—Recoupment of Overpayments—Failure to Report Receipt of Social Security Benefits—Willfulness—Lack of Need of Children.—The recoupment of a retroactive grant of social security benefits made to a family receiving AFDC benefits was annulled and New York welfare officials were directed to return to the mother any sums recouped or withheld pursuant to their recoupment decision. The mother and her minor children had received AFDC since May, 1975. In August, 1977, the mother had received retroactive social security benefits which she transferred to her sister in September to repay her for pre-welfare loans without informing the welfare agency. The determination of the state welfare commissioner upholding the right of the agency to recoup the social security payments had been based on an alleged violation of regulatory provisions authorizing recoupment where there was evidence that the recipient had willfully withheld information about income or resources, and also authorizing recoupment of prior overpayments from current grants without regard to currently available income or resources where overpayments were occasioned by willful withholding of information. Another regulation permitted recoupment only where the recipient was periodically notified of the obligation to report changes in income and resources and periodically acknowledged that the reporting obligations were called to her attention and were understood.

However, in the absence of a demonstration of lack of need, financial assistance to dependent children under the AFDC program could not be reduced on the basis of a parent's conduct. Since there was no denonstration of lack of need in the record presented herein, it was error to order recoupment of the social security funds allocated to the children. Moreover, as to the funds allocated to the mother, there was no substantial evidence that her failure to inform the city welfare agency of the retroactive social security payment was willful. There was no evidence whatever in the record that the mother, who was clearly shown by the record to be illiterate in the English language, had been periodically notified of her obligation to report changes in resources or had periodically acknowledged her understanding of that obligation as the applicable regulations required before recoupment was authorized without regard to currently available income and resources. Under those circumstances, there was no basis for remanding for a new hearing to permit the welfare officials to attempt to supplement that deficiency in the record. **Back reference: ¶ 1610.71.**